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No. 95-1263

In the Supreme Court of the United States

OCTOBER TERM, 1995

CATERPILLAR INC.,
Petitioner,

v.

JAMES DAVID LEWIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

This case was removed from state to federal court at a time when there was not complete diversity of citizenship among the parties. The district court nevertheless declined to remand the case to state court. The absence of diversity was cured prior to trial and judgment in federal court. The question presented is:

Whether, when diversity of citizenship was not complete at the time of removal, but complete diversity existed during trial and at the time of final judgment, the case must be remanded for a new trial in state court.

RULE 29.6 STATEMENT

Petitioner Caterpillar Inc. has no parent companies. Its non-wholly owned subsidiaries are Cyclean, Inc.; Advanced Filtration Systems, Inc.; Health Plan of Central Illinois, Inc.; Caterpillar Commercial N.V.; AO Nevarnash; and UNOC Equipment and Supply, LLC.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 84-90) is not reported. The opinion of the district court denying the motion to remand (J.A. 53-56) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1995, and a petition for rehearing was denied on November 21, 1995 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on February 8, 1996, and was granted on April 15, 1996 (J.A. 91). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1441(a) provides in relevant part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1447(c) provides in relevant part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

STATEMENT

1. The federal removal statutes permit a defendant to remove from state to federal court "any civil action brought

in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). This rule makes the availability of removal turn on whether the case could have been brought in federal court as an initial matter, although a case may be removed on grounds of diversity of citizenship "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). A notice of removal must be filed within 30 days of the defendant's receipt of the complaint. If, however, "the case stated by the initial pleading is not removable," a notice of removal may be filed within 30 days after the defendant learns that the case has become removable. 28 U.S.C. § 1446(b).

Once a case has been removed to federal court, "[a] motion to remand the case [to state court] on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). Orders remanding cases to state court are expressly made unreviewable "by appeal or otherwise." 28 U.S.C. § 1447(d).

2. Respondent James Lewis ("Lewis") was injured on July 9, 1988, while operating a bulldozer manufactured by petitioner Caterpillar Inc. ("Caterpillar") and serviced by Whayne Supply Co. ("Whayne Supply"). Lewis alleged in his complaint that a hydraulic hose near the front of the bulldozer ruptured, allowing hydraulic fluid to escape. The fluid thereafter ignited, causing him to suffer burns. See J.A. 85-86. Liberty Mutual Insurance Group ("Liberty Mutual"), the insurance carrier for Lewis's employer, paid Lewis workers' compensation benefits on account of his injuries.

On June 22, 1989, Lewis brought suit in Kentucky state court against Caterpillar and Whayne Supply. Liberty Mutual intervened as a plaintiff, asserting its subrogation interest in

the workers' compensation benefits. Lewis contended that the fire and resulting injuries were the result of Caterpillar's negligence in manufacturing the bulldozer and failing to give adequate warnings of its dangerous condition, and of Whayne Supply's negligence in overhauling and maintaining the equipment. J.A. 86-87.

3. At the time the complaint was filed in state court, Caterpillar could not have removed the case to federal court because complete diversity of citizenship was absent. See *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Although Liberty Mutual, the intervening plaintiff, was a Massachusetts corporation with its principal place of business in Massachusetts, and Caterpillar, the defendant, was a Delaware corporation with its principal place of business in Illinois, both Lewis, the plaintiff, and Whayne Supply, the other defendant, were citizens of Kentucky.

On June 12, 1990, however, Caterpillar learned that Lewis had agreed to a settlement with Whayne Supply, the non-diverse defendant. J.A. 31-32.[1] Shortly thereafter, Caterpillar removed the case to the United States District Court for the Eastern District of Kentucky pursuant to 28 U.S.C. §§ 1441(a) and 1332. J.A. 30-33.

Lewis moved to remand the case to state court on the ground that the case was not removable because "there is not complete diversity [of citizenship] between the parties hereto." J.A. 36. Specifically, although Lewis conceded that

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[1] Although Lewis reached his settlement with Whayne Supply at an earlier time, he withheld information about the settlement from Caterpillar. Accordingly, Caterpillar did not learn of the settlement until June 12, and it removed the case as soon as it was able to confirm that the settlement had in fact been made. J.A. 31-35. On August 2, 1990, while this case was pending in federal court, Lewis filed in state court an agreed order purporting to dismiss Whayne Supply from the removed state action. J.A. 52.

he had settled his claims with Whayne Supply, he asserted that the settlement did not resolve Liberty Mutual's subrogation claim against Whayne Supply, and therefore that Whayne Supply remained a party to the suit. J.A. 36. Caterpillar responded that the settlement automatically invoked Liberty Mutual's right of subrogation against Whayne Supply as a matter of state law. J.A. 39-42. Kentucky law provides that, when an employee receives workers' compensation benefits and then recovers from the tortfeasor, the workers' compensation carrier may recover its proportionate share of the recovery. KRS 342.700(1). Lewis, however, excluded from his settlement with Whayne Supply that portion of the settlement funds to which Liberty Mutual was entitled by Kentucky law. Caterpillar took the position that Liberty Mutual's claim was derivative of Lewis's claim against Whayne Supply, which had been settled; that under Kentucky law the settlement automatically took account of Liberty Mutual's subrogation rights against Whayne Supply; that Lewis could not circumvent these derivative rights through settlement; and that Liberty Mutual's presence in the case therefore should not be viewed as destroying diversity. The district court agreed with Caterpillar that federal jurisdiction existed and denied the motion to remand on September 24, 1990. J.A. 53-56.

The case then proceeded through discovery and pretrial proceedings in the district court. On June 8, 1993, Liberty Mutual and Whayne Supply entered into a settlement of the subrogation claim and Whayne Supply formally was dismissed from the case. J.A. 79. Thereafter, the case was tried before a jury from November 15 through November 22, 1993, ending in a unanimous verdict for Caterpillar. J.A. 83. The court entered judgment for Caterpillar on November 23, 1993.

4. The court of appeals reversed. J.A. 84-90. In the Sixth Circuit's view, the district court should have remanded the case to state court in 1990 because complete diversity did

not exist at the moment of removal, and the lack of subject matter jurisdiction at the time of removal required it to vacate the district court's judgment and remand the case to state court. J.A. 87-90.[2] The Sixth Circuit explained that,

> at the time Caterpillar removed the case to federal court, plaintiff, a resident of Kentucky, remained a party to the case by virtue of his claim against defendant Caterpillar. Defendant Whayne Supply Co., a Kentucky corporation, was also a party to the case in light of intervening plaintiff Liberty Mutual's subrogation claim against it. Thus, complete diversity did not exist at the time the case was removed to federal court. Unfortunately, we must remand a case that has proceeded through judgment in the district court.

J.A. 89-90 (footnote omitted). The court of appeals evidently was of the view that the absence of complete diversity at the time of removal meant that "the district court lacked jurisdiction over this case." J.A. 90 n.3. The court below did not mention that diversity became complete when Whayne Supply was dismissed from the case pursuant to its settlement with Liberty Mutual, and that complete diversity existed at all times during the trial and when final judgment was entered.

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[2] The court of appeals rejected Caterpillar's argument that there *was* complete diversity when the case was removed because Liberty Mutual should not have been considered for diversity purposes. J.A. 90 n.2. This Court denied review of Caterpillar's challenge to this holding (J.A. 91), and we accordingly will not repeat the arguments on that point here.

SUMMARY OF ARGUMENT

1. The court of appeals was plainly wrong in holding that the judgment of the district court had to be reversed because diversity was not complete at the time of removal. This Court has made clear that, even when jurisdiction did not exist when a case was removed, a remand to state court is unnecessary so long as the jurisdictional defect was cured by the time of trial or judgment; the district court has jurisdiction to decide the case if it "would have had jurisdiction of the controversy had it been brought in the federal court in the posture it had *at the time of the actual trial of the cause or of the entry of judgment.*" *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 16 (1951) (emphasis added).

There is nothing anomalous in this rule. To the contrary, the Court has held in a variety of contexts that proceedings in a district court need not be vacated so long as jurisdiction was perfected by the time of judgment. This approach does not involve "jurisdiction retroactively conferred." *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 836 (1989). Instead, it reflects a recognition that Congress established pragmatic rules of jurisdiction under which technical defects cannot be used to undo complete and otherwise fair proceedings. It therefore is indisputable that the district court had the authority to try and enter judgment in this case.

2. Because there is no jurisdictional defect that requires remand of the case, Lewis's contention must be that the federal removal statute was violated and that he accordingly has a statutory right to demand a remand to state court. But any such contention is insubstantial. Congress drafted the statutory removal provisions to encourage efficiency and avoid unnecessary relitigation, and this Court accordingly has interpreted the removal rules in a manner that "best promote[s] the values of economy, convenience, fairness, and comity." *Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343, 353 (1983). Against this background, Lewis's contention fails for several reasons.

First, remand would be pointless because the statutory error (the removal of a case in which diversity was incomplete) was cured prior to trial. *Second*, the error was harmless: Lewis has not identified any manner in which he was prejudiced by having to try this case in a federal forum. And *third*, Lewis effectively waived his statutory objection to removal by failing to seek an immediate appeal of the district court's refusal to remand; in the meantime, of course, the jurisdictional defect was cured and the parties proceeded to trial and judgment. In this setting — where a remand would toss onto the trash heap six years of federal court proceedings and a six-day jury trial, requiring the parties to start the litigation over from scratch — Lewis would sacrifice congressional intent and common sense for the sake of "hypertechnical jurisdictional purity." *Newman-Green*, 490 U.S. at 837. This Court's decisions reject such an approach.

ARGUMENT

BECAUSE THE DISTRICT COURT PLAINLY HAD FEDERAL JURISDICTION AT THE TIME THAT THIS CASE WAS TRIED AND JUDGMENT WAS ENTERED, THE COURT OF APPEALS ERRED IN REVERSING THE JUDGMENT AND ORDERING A REMAND TO STATE COURT

The result mandated by the court of appeals in this case may fairly be characterized as nonsensical. It is undisputed that there was complete diversity between the parties both at the time of trial and when judgment was rendered. There can be no doubt that the district court had jurisdiction to decide the case. And there is no suggestion that the district court's decision of the case denied Lewis particular rights conferred by federal law. Nevertheless, the court below held that the district court's judgment must be vacated because diversity between the parties was not complete during an *earlier* stage

of the litigation — a holding that renders nugatory a six-day jury trial and requires remand of the case to state court, where the parties will have to start the litigation over a 1988 injury from scratch.

The delay — and the waste of judicial and litigants' resources — that will flow from this holding are manifest. Yet the court of appeals' rule is not necessary to preserve the integrity of federal jurisdiction. It does not advance any interest served by the removal statute. And it frustrates the clear federal policy of avoiding delay and duplicative proceedings when the right to remove is invoked. This accordingly is, quite plainly, a case where Caterpillar "should not be compelled to jump through judicial hoops merely for the sake of hypertechnical jurisdictional purity." *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 837 (1989). Because the *only* value served by the decision below is that of the most "hypertechnical" and wooden formalism, that decision should be set aside.

A. The District Court Had Subject Matter Jurisdiction To Decide The Case

The court of appeals evidently accepted Lewis's contention below that "the district court lacked subject matter jurisdiction because complete diversity between the parties did not exist *at the time of removal.*" J.A. 87-88 (emphasis added). See J.A. 90 n.3 ("the district court lacked jurisdiction over this case"). That conclusion, however, was fundamentally wrong. In fact, repeated decisions of this Court — none of which were cited or discussed by the court below — make clear that a federal court has the power to decide a case when jurisdiction exists *at the time of that court's decision*. Because it is undisputed that diversity was complete at the time of trial and judgment, the district court plainly had jurisdiction to decide the case.

1. This Court long ago settled the proposition that remand to the state court is unnecessary even if jurisdiction

did not exist at the time of removal, so long as the district court had subject matter jurisdiction at the time of judgment. In *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 16-17 (1951) (emphasis added) the Court explained:

> There are cases which upheld judgments in the district courts even though there was no right to removal. In those cases the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of judgment. That is, *if the litigation had been initiated in the federal court on the issues and between the parties that comprised the case at the time of trial or judgment, the federal court would have had cognizance of the case.* This circumstance was relied upon as the foundation of the holdings.

The Court went on to hold that the district court's judgment had to be vacated in *Finn* because "[t]he posture of the case *even at the time of judgment* also barred federal jurisdiction." *Id.* at 17 (emphasis added).

The Court subsequently confirmed that *Finn* meant exactly what it said, holding that the judgment in a case that had been improperly removed to federal court did not have to be set aside because jurisdiction existed at the time of decision. In *Grubbs* v. *General Electric Credit Corp.*, 405 U.S. 699, 702 (1972) (emphasis added), the Court declared that

> [l]ongstanding decisions of this Court make clear * * * that where after removal a case is tried on the merits without objection and the federal court enters judgment, *the issue in subsequent proceedings on appeal is not whether the case was properly removed*, but whether the federal district court would have had original jurisdiction of the case had it been filed in that Court.

The Court characterized this as a "requirement that jurisdiction exist *at the time of judgment*" (*id.* at 705 (emphasis added)); in *Finn*, the *Grubbs* Court added, "[s]ince complete diversity did not obtain *even as of the date of judgment*, and since there was no other basis for federal jurisdiction, this Court reversed the judgment of the Court of Appeals, which had held the case properly removable." *Id.* at 704 (emphasis added).

Citing *Finn* and *Grubbs*, other courts have agreed that, even when jurisdiction did not exist at the time of removal, the crucial question is whether complete diversity (or some other ground of federal jurisdiction) was present at the time of judgment. See, *e.g.*, *Able* v. *Upjohn Co.*, 829 F.2d 1330, 1333 (4th Cir. 1987) (Wilkinson, J.) ("The Supreme Court has recognized [in *Finn*] that a judgment entered in a case that was improperly removed may stand where, as here, the judgment works no expansion of federal jurisdiction"), cert. denied, 485 U.S. 963 (1988); *Gould* v. *Mutual Life Ins. Co.*, 790 F.2d 769, 773 (9th Cir.), cert. denied, 479 U.S. 987 (1986); *Sheeran* v. *General Electric Co.*, 593 F.2d 93, 97 (9th Cir.), cert. denied, 444 U.S. 868 (1979). The leading commentators in the area therefore have concluded that "even where a case is not, or does not appear to be within the jurisdiction of the federal court *at the time of removal*, a judgment entered by a trial court is valid if at the time of the actual trial or the entry of judgment the requisites of original jurisdiction existed." 1A MOORE'S FEDERAL PRACTICE ¶ 0.157 [11.-3], at 172 (2d ed. 1996) (emphasis in original).

2. There is nothing anomalous in this rule. To the contrary, the Court has held in a variety of settings that proceedings in a district court need not be vacated so long as jurisdiction is perfected by the time of trial or judgment — or, indeed, while the case is on appeal. To be sure, the Court has indicated that "the existence of federal jurisdiction ordinarily depends on facts as they exist when the complaint is filed." *Newman-Green*, 490 U.S. at 830. The Court has

hastened to add, however, that "[l]ike most general principles * * * this one is susceptible to exceptions." *Ibid.*

The Court sketched out some of these exceptions in *Newman-Green*, where it stated that Fed. R. Civ. P. 21 "invests district courts with the authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered." 490 U.S. at 832. And the Court went on to hold that when complete diversity did not exist at the time of trial, courts of appeals also have "the power to dismiss jurisdictional spoilers" (*id.* at 830); so long as jurisdiction is perfected while the case is on appeal, the absence of diversity at an earlier stage of the case does not render the district court proceedings nugatory. See *id.* at 835-837. Indeed, this Court itself has permitted the addition of parties when "necessary to establish the existence of a justiciable case" (*id.* at 834 n.8, citing *Mullaney* v. *Anderson*, 342 U.S. 415 (1952)), holding that a cure for the jurisdictional defect even at that late stage of the case made it unnecessary to "'dismiss[] the petition and thereby requir[e] the plaintiffs to start over again in the District Court." *Id.* at 833. See *id.* at 835 (noting that in *Carneal* v. *Banks*, 23 U.S. (10 Wheat.) 181 (1825), "this Court itself dismissed the nondiverse parties while acting in an appellate capacity").[3]

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[3] *Finn* reflects an application of this principle. On remand from this Court's decision in that case, the plaintiff was allowed to dismiss his claims against the non-diverse defendant. With federal jurisdiction thus perfected, the court of appeals held that the original trial was not a nullity and a new judgment was entered on the verdict returned at that trial. *Finn* v. *American Fire & Casualty Co.*, 207 F.2d 113 (5th Cir. 1953). This Court denied review of the decision affirming that judgment. 347 U.S. 912 (1954). See *Riggs* v. *Island Creek Coal Co.*, 542 F.2d 339, 343 (6th Cir. 1976); 1A MOORE'S FEDERAL PRACTICE, *supra*, ¶ 0.157[11.-3], at 171.

This holding, like the rule stated in *Finn* and *Grubbs*, does not involve "jurisdiction retroactively conferred." *Newman-Green*, 490 U.S. at 836. Instead, it reflects a recognition that Congress established pragmatic rules of jurisdiction under which technical defects cannot be used to undo complete and otherwise fair proceedings, so long as jurisdiction was perfected at some point prior to the completion of the litigation. As the Court put it in *Newman-Green*, "[a]ppellate-level amendments to correct jurisdictional defects may not be the most intellectually satisfying approach to the spoiler problem, but, as Judge Posner eloquently noted, because 'law is an instrument of governance rather than a hymn to intellectual beauty, some consideration must be given to practicalities.'" *Id.* at 836-837 (citation omitted).

This focus on the creation of a workable system that avoids setting aside or duplicating completed proceedings has led the Court to hold in a wide range of contexts that it is not necessary for jurisdictional requirements to be satisfied continuously throughout the course of a proceeding. A remand to state court, for example, is not necessary when the amount in controversy falls below the jurisdictional minimum after removal; "'events occurring subsequent to removal which reduce the amount recoverable ... do not oust the district court's [diversity] jurisdiction.'" *Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343, 356 n.12 (1983), quoting *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 293 (1938) (ellipses and bracketed material added by the Court). Similarly, jurisdiction is retained if a party changes citizenship after removal in a manner that destroys complete diversity. See *St. Paul Mercury Indemnity Co.*, 303 U.S. at 293-296; 14A C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3721, at 214 (1985).

Indeed, in this Court Lewis evidently acknowledges the point and implicitly concedes that the district court had jurisdiction to decide the case. In his brief in opposition to the petition for certiorari (at 6), Lewis recognized that, had

he not sought a remand at the time of removal, he would have waived his asserted right to trial in state court. But it is, of course, black-letter law that subject matter jurisdiction cannot be conferred by consent or waiver. See, *e.g.*, *Finn*, 341 U.S. at 17-18. Lewis's concession that he could have waived his right to remand therefore necessarily concedes as well that the district court had subject matter jurisdiction. Thus, it is indisputable that the district court had the authority to try and enter judgment in this case, and that the court of appeals erred in holding that the judgment had to be vacated for lack of subject matter jurisdiction.

B. Even When A Case Is Improperly Removed From State Court, The Removal Statutes Do Not Require A Remand When The Error Was Cured, Was Harmless, Or Was Waived

Since there is no *jurisdictional* defect that requires remand of this case, Lewis's contention must be that the federal removal statutes were violated and that those provisions grant plaintiffs a *statutory* right to demand a remand to state court whenever removal was improper. Lewis did not, however, make any such argument either in the court below or in his brief in opposition to the petition for certiorari.[4] In any event, if this is Lewis's position it plainly lacks merit, for several reasons. *First*, the statutory error here (removal of a case in which diversity was incomplete) was cured prior to trial when the non-diverse party was dismissed. *Second*, the error was harmless; Lewis received a fair trial before a competent tribunal. And *third*, Lewis effectively waived his objection to removal by failing to seek an immediate appeal of the district court's refusal to remand,

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[4] Lewis therefore is foreclosed from raising the argument now. See, *e.g.*, *Lytle* v. *Household Mfg. Co.*, 494 U.S. 545, 551-552 n.3 (1990).

a failure that rendered his statutory objection moot when jurisdiction subsequently was perfected.

1. "Removal proceedings are in the nature of process to bring the parties before the United States court." *Mackay* v. *Uinta Development Co.*, 229 U.S. 173, 176 (1913). To be sure, certain errors in the removal process[5] may be urged in the district court as grounds for remand. And if those errors are overlooked by the district court, are *not cured during trial,* and were not waived by the party seeking remand, they may be considered on appeal[6] — subject, of course, to the

[5] Examples might include removal to the wrong federal judicial district or a failure of all defendants to seek removal. See 28 U.S.C. § 1446.

[6] That apparently was the situation in *Grubbs*, where there was an error in the removal process — an error that was not cured prior to trial — rather than an absence of jurisdiction at the time of removal. There, a New York corporation brought suit against a Texas resident in Texas state court. The defendant subsequently filed a cross-action against the United States pursuant to 28 U.S.C. § 2410. See 405 U.S. at 700-701. The United States then removed the entire action to federal court pursuant to 28 U.S.C. § 1444, which permits removal in actions brought under Section 2410; the plaintiff did not object to removal and the court proceeded to rule for the defendant.

On appeal, the court of appeals on its own motion concluded that Section 2410 could not be invoked in the case, that Section 1444 therefore provided no basis for removal, that no other basis for removal was available, and that the case accordingly must be remanded to state court. See 405 U.S. at 702. In reversing, this Court observed that the district court had diversity jurisdiction to decide the controversy between the New York plaintiff and the Texas defendant (even though that diversity did not itself provide a ground for removal, because under 28 U.S.C. § 1441(b) removal is permitted on diversity grounds only if none of the defendants are residents of the forum state). See 405 U.S. at 704-705. Yet the statutory removal error had never been cured because Section 1444 remained unavailable and there was no other statutory basis for removal.

It was in this setting that the Court applied the rule "that where after removal the case is tried on the merits *without objection* and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." *Id.* at 702 (emphasis added). It made sense in that context to note that there had been no objection to removal because the removal error — the mistaken invocation of Section 1444 — had never been cured. Here, in contrast, the error (the lack of diversity) *was* cured after removal.

normal harmless error inquiry. See 28 U.S.C. § 2111; 1A MOORE'S FEDERAL PRACTICE, *supra*, ¶0.157[10.-2], at 165. But however much sense that approach might make when the mistake in the removal process is never corrected, it makes no sense at all to permit a removal error to be challenged on appeal after final judgment when, as in this case, the defect *was cured prior to trial.* Setting aside the judgment in such a case because the district court made what has proved to be a wholly inconsequential error would represent a triumph of "hypertechnical" formalism over common sense and sound judicial administration.

In fact, Lewis's approach plainly is inconsistent with the intent of Congress, which drafted the statutory removal provisions to encourage efficiency and avoid unnecessary relitigation. For example, because Congress was aware that "federal removal provisions may become a device affording litigants a means of substantially delaying justice" (*Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 355 (1976) (Rehnquist, J., dissenting)), it provided in 28 U.S.C. § 1447(d) that parties may not appeal a district court's decision to remand a case to state court, "whether [the decision is] erroneous or not." *Thermtron Products*, 423 U.S. at 343. As at least one court of appeals has recognized, a rule that

precludes a remand after trial so long as the district court had jurisdiction at the time of judgment "promotes finality and judicial efficiency [in the same manner] as does 28 U.S.C. § 1447(d)." *Gould*, 790 F.2d at 774.

Similarly, Congress has acted to remove other inefficiencies from the removal process. At one time the court-created doctrine of "derivative jurisdiction" was thought to require dismissal of suits removed to federal court, even though the federal court had jurisdiction to decide the case. That doctrine was premised on the view that "[t]he jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.*, 258 U.S. 377, 382 (1922). See *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 26 n.27 (1983).

Under this rule, if a plaintiff brought suit in state court on a claim over which the federal courts had exclusive jurisdiction, and the case subsequently were removed to federal court, the federal court would be obligated to dismiss the suit because the state court would have lacked jurisdiction to decide it. See 1A MOORE'S FEDERAL PRACTICE, ¶ 0.157[3.-1], at 55-58 (citing cases). Not surprisingly, this approach was criticized as "indefensibl[e] from the standpoint of practical judicial administration." *Id.* 0.157[3.-2], at 58; see *id.* at 59-60. Congress agreed, providing in 28 U.S.C. § 1441(e) that "[t]he court to which [a] civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." See H.R. Rep. No. 423, 99th Cong., 2d Sess. 13 (1986). The rule advanced by Lewis is in clear tension with this statutory structure, which Congress crafted to eschew the technical and to limit delay.

2. Here, these same "practicalities weigh heavily in favor" of a rule that would leave the district court's judgment intact. *Newman-Green*, 490 U.S. at 837. The Court has noted that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Id.* at 836. As a consequence, the Court has sought to interpret the rules of removal in a manner that "best promote[s] the values of economy, convenience, fairness, and comity. Both litigants and States have an interest in the prompt and efficient resolution of controversies based on state law." *Carnegie-Mellon University*, 484 U.S. at 353. Indeed, it is particularly important to avoid an overly rigid approach in the removal area, which "remains technically difficult" (1A MOORE'S FEDERAL PRACTICE, *supra*, ¶ 0.157[1.-3], at 44) and where the occasional immaterial mistake may be unavoidable.

With these principles in mind, as Judge Wilkinson wrote for the Fourth Circuit in a case identical to this one, "judicial economy and finality require that the district court's judgment be allowed to stand. Where a matter has proceeded to judgment on the merits and principles of federal jurisdiction and fairness to parties remain uncompromised, to disturb the judgment on the basis of a defect in the initial removal process would be a waste of judicial resources." *Able*, 829 F.2d at 1334. That surely describes the situation in this case. This suit was filed almost seven years ago; it was removed to federal court almost six years ago. It was resolved in a six-day jury trial before a competent court some two and one-half years ago, in November 1993. Yet Lewis would vacate the judgment entered by that court, throw six years' worth of federal court proceedings into the trash bin, and start the case over from the beginning, all because the district court made what proved to be an inconsequential error at the time of removal.

Lewis's approach is more faithful to *Bleak House* than it is to the requirements of federal law. The Third Circuit's observation, addressed to a proceeding, like this one, in which there was "a brief lack of complete diversity at the beginning of the case" (*Knop* v. *McMahon*, 872 F.2d 1132, 1139 n.16 (3d Cir. 1989)), is equally appropriate here:

> This factually complex dispute has been completely adjudicated by a court which had jurisdiction over the parties throughout the trial and at the time of judgment. The parties and the court have devoted extensive resources to its adjudication. They have had the benefit of a full assessment of the disputed evidence by an impartial factfinder. To erase the result of that process by requiring them to litigate these claims all over again in a state court does not seem to us necessary under the case law with respect to removal for diversity.

3. That conclusion is especially apt because, "[i]n the instant case, it is evident that none of the parties [were] harmed" by trial of the case in federal rather than state court. *Newman-Green*, 490 U.S. at 838. See *id.* at 833. The federal court was, of course, fully competent to resolve Lewis's claims. Indeed, because complete diversity in fact existed at the time of trial, federal court was the presumptively *better* forum; trial there served to "protect nonresidents from the local prejudices of state courts." 14A C. Wright, A. Miller & E. Cooper, *supra*, § 3721 at 187. See Rothfeld, *Rationalizing Removal*, 1990 B.Y.U.L. REV. 221, 226 (removal assures "the availability of a sympathetic and competent forum * * * to prevent bias against out-of-state litigants").

In these circumstances, as the leading commentators in the area have suggested,

> [t]he federal courts could * * * make a very constructive contribution by eschewing the technical. Hypertechnical application of the removal statutes furthers no goal of federalism and can be disruptive of state jurisdiction. While the purposes of the removal statute should be effectuated, we believe that harmless error should be treated as harmless error.

1A MOORE'S FEDERAL PRACTICE, *supra*, ¶ 0.157[13], at 199. See 28 U.S.C. § 2111 (appellate courts shall ignore "errors or defects which do not affect the substantial rights of the parties"). This principle requires reversal of the decision below.[7]

4. It should be added that the rule upon which we rely does not leave the plaintiff without a remedy when the district court errs in declining to remand a case to state court. If the district court accepts a removed case in violation of the removal statute and the defect is never cured, the plaintiff may seek remand (see 28 U.S.C. § 1447(c)) and may present the error on appeal after final judgment. See *Mansfield, Coldwater & Lake Michigan R. Co.* v. *Swan*, 111 U.S. 379 (1884); Rothfeld, *supra*, 1990 B.Y.U.L. REV. at 242 & n.106. And pursuant to 28 U.S.C. § 1292(b), the plaintiff may seek certification to take an immediate interlocutory appeal of the district court's refusal to remand. The courts generally have recognized the availability of certification on the question whether removal was proper (see 1A MOORE'S FEDERAL PRACTICE, *supra*, ¶ 0.169 [2.-3], at 707; 14A C. Wright, A. Miller, & E. Cooper, *supra*, § 3740, at 596-598), and the procedure had been recognized in the Sixth Circuit prior to the removal of this case. See *Union Planters Nat'l Bank of Memphis* v. *CBS, Inc.*, 557 F.2d 84, 86 (6th Cir. 1977). Lewis, however, failed to seek certification under Section 1292(b).

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[7] The jurisdictional defect here, before it was cured, was purely statutory; the Constitution itself, of course, does not require complete diversity. See *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 530-531 (1967).

This failure effectively waived Lewis's complaint that the procedure followed on removal failed to comply with the requirements of the removal statute. "Interests of finality and judicial economy * * * strongly suggest that the district court's judgment should not be disturbed where a party fails to avail himself of a remedy that might earlier have resolved the removal question." *Able*, 829 F.2d at 1333. Thus,

> [w]hen a party elects to forego an interlocutory appeal, he runs the risk that the federal court will enter judgment on the basis of complete diversity. * * * This rule forces parties to give careful consideration to the importance of their objection to removal, [and] brings the benefit of early determination of the proper forum.

Able, 829 U.S. at 1333-1334. See *Gould*, 790 F.2d at 774. The risk addressed by Judge Wilkinson in *Able*, of course, is what materialized here: during the period between removal and final judgment diversity became complete. Lewis accordingly forfeited his opportunity to challenge the propriety of the removal when he failed to pursue an interlocutory appeal.

This conclusion is strongly supported by the analysis of three Justices in *Alligator Co., Inc.* v. *La Chemise Lacoste*, 421 U.S. 937 (1975) (White, J., dissenting from denial of certiorari). They were of the view that, where the propriety of removal could be raised in an interlocutory appeal (in that case, on appeal from denial of a preliminary injunction), "*Grubbs* * * * should be extended so as to *require* that the question be raised in such an appeal. Otherwise, wasteful litigation is invited, and the losing party on the merits is given another bite at the apple." *Id.* at 938-939 (emphasis in original).[8] Cf. *Van Cauwenberghe* v. *Biard*, 486 U.S. 517,

[8] In fact, it appears that federal subject matter jurisdiction was absent in that case even at the time of the court of appeals' judgment, which seemingly made a remand to state court mandatory. See *La Chemise Lacoste* v. *Alligator Co., Inc.*, 506 F.2d 339, 343-346 (3d Cir. 1974). That consideration may explain the Court's denial of review.

529-530 (1988) (Court relied in part on the availability of interlocutory appeal under Section 1292(b) in refusing to permit interlocutory appeals as of right challenging *forum non conveniens* determinations). In this case as well, where Lewis failed to pursue an opportunity to obtain immediate review of the order denying a remand, his dilatory approach should not be rewarded by allowing him "to start over in the District Court," an outcome that "'would entail needless waste and runs counter to effective judicial administration.'" *Newman-Green*, 490 U.S. at 833, quoting *Mullaney*, 342 U.S. at 417.

In sum, the remand ordered by the court of appeals represents a gross miscarriage of justice. The jurisdictional defect in the case was cured, Lewis was not prejudiced, and he received a trial in federal court that was fair in every respect. No decision of this Court, no requirement of any federal statute, and no principle of sound judicial administration requires setting aside the results of that trial and giving Lewis a second bite at the apple in state court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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